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Supreme Court of the United States

October Term, 1964

No. 275

SWEDISH AMERICAN LINES,
Petitioner,

against

JOSEPH FERRANTE, ANTONIO HRONCICH and VITO SALVEMINI,
Respondents,

against

NACIREMA OPERATING CO., INC.,
Respondent-Impleaded.

RESPONDENTS' BRIEF IN OPPOSITION

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RESPONDENTS' BRIEF IN OPPOSITION

Opinions Below

The District Court's findings of fact and conclusions of law (there was no opinion) were not officially reported but were quoted in the opinion of the United States Court of Appeals, set forth in Petitioner's Appendix B, pages 1b to 14b. The opinion is reported at 331 F. 2d 571.

Jurisdiction

The judgment of the United States Court of Appeals for the Third Circuit was entered on April 16, 1964. The jurisdiction of this Court is predicated upon 28 U. S. C. § 1254(1).

Questions Presented

1. Whether there was an issue of fact of shipowner's negligence when the ship's officers knew, or should have known, that the stevedore method of discharging its cargo did not conform to the standard of reasonable care, thereby creating a hazardous condition, and did not forbid use of the method.

2. Whether there was an issue of fact of shipowner's failure to provide a seaworthy vessel, arising out of stevedore's use of an improper method of unloading cargo thereby creating a hazardous condition.

Statutes and Regulations Involved

No statutes or regulations have heretofore been introduced into this matter. Petitioner asserts that the Safety and Health Regulations for Longshoring, 29 C.F.R. Part 1504, are now herein involved.

Said regulations are set forth in Petitioner's Appendix A, pages 1a-6a.

Statement of the Case

The findings of fact by the District Court are as follows:

"Findings of Fact

"1. Libelants Joseph J. Ferrante, Antonio Hroncich and Vito Salvemini, were on October 28, 1960, and now are residents of the State of New Jersey, and were injured while working as longshoremen employed by Nacirema Operating Co., Inc. in the #2 hold of the M/S Maltesholm on October 28, 1960.

"2. Claimant-respondent, Swedish American Lines was and now is a corporation duly organized and existing under and by virtue of the laws of the Kingdom of Sweden and was, on October 28, 1960, and still is, the owner of the M/S Maltesholm.

"3. Respondent-Impleaded, Nacirema Operating Co., Inc., was, on October 28, 1960, and now is, a corporation duly organized and existing under and by virtue of the laws of one of the states of the United States and was on October 28, 1960, and still is, doing business in the State of New Jersey as a stevedore.

"4. The M/S Maltesholm was on October 28, 1960, and now is, a merchant vessel of Swedish registry, her home port being Gothenburg, Sweden. The ship had six hatches, #2, the site of the accident, being in the forward part of the ship.

"5. Libelant Ferrante asked the stevedore hatch boss for slings to be used in unloading some plywood boards. In turn the hatch boss asked the third mate of the ship for 'slings.'

"6. The third mate of the M/S Maltesholm procured and gave to the stevedore hatch boss two manila rope slings which the hatch boss then sent down to the employees of Nacirema, who proceeded to make up a sling load of plywood boards by assembling two piles of the boards side by side, these piles resting on 4 x 4 timbers so that each sling could be passed beneath the boards. Each sling was passed around the piles, one at each end, looped through itself and attached to a single hook. The hook was attached to wire rope runners which would lift the sling load from the hold.

"7. The making up of this sling load was done entirely by and under the direction of employees of Respondent-Impleaded.

"8. The only suggestion made by the third mate to the hatch boss was not to make big sling loads 'because something might be could happen and broken,' to which the hatch boss replied 'I am the foreman and I know what I am doing.' No attempt was made by the third mate to direct the method of unloading nor did he interfere in any way with the conduct of the stevedoring.

"9. When the sling load of boards was lifted out of the hatch, the load came apart and some of the boards fell, striking Libelants and injuring them.

"10. Libelants' expert witness (with extensive experience as a longshoreman, as a supervisor of loading and unloading ships and as a ship foreman) testified that it was not standard procedure to make two piles of plywood boards, placed side by side to be lifted by slings, single piles only being used to make a sling load. He further testified that if this standard practice were not followed, it would be an element that would cause the load to fall. He also testified that the use of either rope or wire is standard practice for lifting plywood, and that there was a preference for the use of rope on plywood.

"11. The accident was caused by the manner in which the sling load was made up by employees of Respondent-Impleaded with two piles, side by side.

"12. The duties of the third mate did not include supervision and control of the manner in which the longshoremen were doing their work. Rather, his duties consisted in pointing out the cargo to be discharged at Jersey City and also to observe the longshoremen so as to prevent damage to or theft of cargo, damage to the ship or smoking by the longshoremen.

"13. At the close of Libelant's case as to liability, Libelants have reserved their rights to introduce further medical testimony. Claimant-Respondent reserving its rights to proceed further if its motion be denied, moved to dismiss the libel and Respondent-Impleaded, with a similar reservation of rights if its motion be denied, moved to dismiss the petition."

Said facts were summarized by the Court of Appeals in its decision as follows:

"At the time of the accident the stevedore's longshoremen were engaged in discharging 9' x 5' 3/4" plywood boards from No. 2 hold of the M/S Maltesholm; the longshoremen used manila ropes sup-

> plied by the ship to form a sling in which two piles or stacks of board were placed; while a sling load was being lifted out of the hatch it came apart and some of the boards fell injuring the libellants; the placing of two piles of boards in a sling was not standard procedure; the loading of the slings 'was done entirely by and under the direction' of the stevedore; 'the accident was caused by the manner in which the sling load was made up'; the third mate of the ship, one Szewczyk, told the stevedore's foremen 'not to make big sling loads "because something might be could be happen and broken" ', but 'no attempt was made by the third mate to direct the method of unloading nor did he interfere in any way with the conduct of the stevedoring.' "

The Court of Appeals took issue with the conclusions of the District Court, refusing to negate shipowner's liability for negligence because of absence of exercise of control over the stevedoring operation, holding that such exercise of control was not the exclusive criteria for testing the owner's negligence in view of evidence presented that the officers knew or should have known that the stevedore's method of discharging its cargo did not conform to the standard of reasonable care, thereby creating a hazardous condition, and failing to forbid the use of that method of discharge. Further, the Court held that an issue of fact was presented as to whether the vessel was unseaworthy by reason of stevedore's negligent conduct creating a hazardous condition in employing an improper method of discharging cargo, a failure to perform the operation safely.

ARGUMENT

I

The issue of negligence.

The Court below remanded this matter for a new trial on the ground that there was sufficient evidence presented as to whether Petitioner's officers knew or should have known that an unsafe method of discharge of the cargo would be undertaken. In view of the acknowledged duty upon the shipowner to provide longshoremen with a safe place to work, *Halecki* v. *United,* 251 F. 2d 708 (2C), affirmed on point and reversed on other grounds, 358 U. S. 613; *Beard* v. *Ellerman,* 289 F. 2d 201 (3C), affirmed on point and reversed on other grounds, sub. nom., *Atlantic* v. *Ellerman,* 369 U. S. 355, there was nothing more than an affirmation of the long-settled principle of law that shipowner's knowledge of a dangerous condition, coupled with its failure to rectify, would give rise to liability irrespective of whether it had control of the area, *Hawn* v. *Pope & Talbot,* 198 F. 2d 800 (3C), affirmed 346 U. S. 406; *Skovgaard* v. *Tungus,* 252 F. 2d 14 (3C), affirmed 358 U. S. 588; *Halecki* v. *United,* 251 F. 2d 708 (2C), reversed on other grounds 358 U. S. 613; *Gutierrez* v. *Waterman,* 373 U. S. 206; *Brabazon* v. *Belships,* 202 F. 2d 904 (3C); *Holley* v. *Manfred,* 269 F. 2d 317 (4C); *Knox* v. *United,* 294 F. 2d 354 (3C), and for the same principle of law under the Federal Employers' Liability Act, 45 U. S. C. § 51, *et seq.*; *Shenker* v. *Baltimore,* 374 U. S. 1.

As such, the conclusion by the Court below that the District Court had incorrectly made "the 'exercise of control' the exclusive criteria for testing the ship's negligence" was eminently sound law, consistent with the decisions of this Court and of various Courts of Appeals.

There is certainly no conflict between the circuits, nor is the issue, so often answered, of nationwide importance at this time.

II

The issue of unseaworthiness.

In remanding the matter on the question of shipowner's failure to provide a seaworthy vessel, the Court below affirmed the oft-stated law that a question of fact existed of shipowner's liability when an unseaworthy condition was caused by the failure of the stevedore to properly discharge cargo due to employment of an improper method or manner of operation.

In so doing the Court affirmed the District Court's finding of stevedore's negligence in the "method of assembling two piles of plywood boards 'side by side' to make a sling load", holding that the failure of the stevedore to perform safely was a basis for liability for shipowner's failure to provide a seaworthy vessel.

The opinion was consistent with decisions of this Court in finding that an improper method of loading or unloading cargo or improper use of incidental equipment might give rise to unseaworthiness, *Morales* v. *City*, 370 U. S. 165; *Seas* v. *Sieracki*, 328 U. S. 85, *Alaska* v. *Petterson*, 347 U. S. 396; *Rogers* v. *United*, 347 U. S. 984; *Ryan* v. *Pan-Atlantic*, 350 U. S. 124; *Weyerhaeuser* v. *Nacirema*, 355 U. S. 563; *Crumady* v. *Fisser*, 358 U. S. 423; *Atlantic* v. *Ellerman*, 369 U. S. 355, that the stevedore's failure to perform safely was a basis of shipowner's liability, *Italia* v. *Oregon*, 376 U. S. 315.

Petitioner's concept of the question posed to the Court below and to this Court appears to be unduly restrictive. The thrust of the opinion by the Court of Appeals centered on the issue of stevedore improper activity creating a hazardous (unseaworthy) condition. As such it was the creation of the unseaworthy condition that was stressed, not whether ship's equipment was safe for the purpose intended. In so doing, the Court again affirmed this Court's

decision in *Alaska* v. *Petterson*, 347 U. S. 396, affirming 205 F. 2d 478 (9C), in holding that it was "only necessary to show that the *condition* upon which the absolute liability is determined—unseaworthiness—exists" (p. 479).

Consistent with the decisions in *Alaska* v. *Petterson*, *supra*, and *Crumady* v. *Fisser*, 358 U. S. 423, whether stevedore use of an improper method of discharging cargo created an unseaworthy condition was held to be a question of fact, *Grillea* v. *United States*, 232 F. 2d 919 (2C); *Grzybowski* v. *Arrow*, 283 F. 2d 481 (4C); *Knox* v. *United*, 294 F. 2d 354 (3C); *Puddu* v. *Royal*, 303 F. 2d 752 (2C); *Ballwanz* v. *Isthmian*, 319 F. 2d 457 (4C); *Knox* v. *United*, 320 F. 2d 247 (3C); *Provenza* v. *American*, 324 F. 2d 660 (4C);[1] *Scott* v. *Isbrandtsen*, 327 F. 2d 113 (4C).

The District Court's determination erroneously excluded consideration of the issue as to whether conduct by the stevedore could render the vessel unfit for the purpose intended, improperly restricting the doctrine of seaworthiness to examination of conditions created by ship's equipment. As such, the decision by the Court of Appeals was correct in remanding the case for further determination on a proper basis—whether the vessel was unseaworthy in view of the evidence of stevedore's negligence in improperly discharging the boards.

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[1] *In Provenza* v. *American*, 324 F. 2d 660 (4C), the Department of Labor's Safety and Health Regulations for Longshoring, 29 C. F. R. Part 1504, defining reasonably safe conditions, were held binding upon the shipowner as well as the stevedore-employer, the Court holding that "their violation would render the ship unseaworthy" (p. 665), that "The regulation casts upon the shipowner no new duty, nor does it relieve him of any pre-existing duty * * *. It prescribes a standard of safety, not a new duty" (p. 666).

Petition for writ of certiorari was denied, 376 U. S. 952.

There was and is no inconsistency between circuits, nor is the question presented of any uncommon importance, involving only the failure of a trial Court to follow settled concepts of law as laid down by this Honorable Court and the several Courts of Appeals in the cases discussed above.

CONCLUSION

The writ of certiorari should be denied in accordance with the facts and law above set forth.

Dated: New York, New York,
August 25th, 1964.

Respectfully submitted,

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